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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1940.

FIRST TRUST & SAVINGS BANK OF ONEIDA, TENNESSEE,
Petitioner,

vs.

PAUL J. KENT, Receiver of Chattanooga National Bank,
Respondent.

No. 270.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit

and

BRIEF IN SUPPORT THEREOF.

J. A. FOWLER,
Counsel for Petitioner.

S. F. FOWLER,
Of Counsel.

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PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Sixth Circuit.

To the Honorable Harlan F. Stone, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows that this is a civil action brought in the Federal Court for the Eastern District of Tennessee, Southern Division, by the First Trust & Savings Bank of Oneida, Tennessee, petitioner herein, against Paul J. Kent, Receiver of the Chattanooga National Bank of Chattanooga, Tennessee, respondent herein, for the purpose of recovering the proceeds of a draft for $50,687.01, which draft the petitioner had delivered to the said Chattanooga bank for collection and deposit.

The cause comes to this Court after judgment of the Court of Appeals, Sixth Circuit, affirming a judgment which sustained defendant's motion to dismiss the complaint. The record presents the question of whether or not the complaint states a cause of action.

The complaint sets forth that Paul J. Kent, Receiver of the Chattanooga National Bank, Chattanooga, Tennessee, the defendant in the trial Court and respondent herein, is engaged in winding up the affairs of the said insolvent National Banking Association, and that the First Trust & Savings Bank of Oneida, Tennessee, petitioner herein, is entitled to receive from him the full amount of the proceeds of a draft in the amount of $50,687.01 forwarded by the petitioner to the First National Bank of Chattanooga on February 25, 1933. It is further alleged that:

1. On Saturday, February 25, 1933, Scott County, Tennessee, deposited a draft drawn by the Cincinnati, New Orleans & Texas Pacific Railway Company in the amount of $50,687.01 in the petitioner bank. Said draft was payable to Scott County, Tennessee, and was endorsed, "Pay to the order of First Trust & Savings Bank, Oneida, Tennessee, Roscoe Byrd, Trustee." Immediate credit was given for the deposit[1] (R. 2).

2. The petitioner endorsed the draft, "Pay to the order of the First National Bank of Chattanooga, Tennessee," and forwarded it to that bank for collection and credit

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[1] It has been finally determined in the case of **Scott County v. Kent, Receiver** (C. C. A. 6, 1938), 97 Fed. (2d) 971, that the title to this paper was transferred by Scott County to the petitioner. Petitioner was not a party to that suit. One basis for the decision was that the Trustee of Scott County performed numerous acts "in which he recognized the ownership of the Oneida bank in the draft." The petitioner gave the said Trustee two certificates of deposit, unconditional in form, representing the full amount of the proceeds of said draft; the County Trustee made no proof of claim against the Chattanooga bank; he did not demand that any part of the dividends paid by that bank be paid to the County; in fact, he did not communicate with the Chattanooga bank. 97 Fed. (2d), at page 973. Certiorari was denied by this Court, 305 U. S. 658, 59 Sup. Ct. 358, 83 L. ed. 427.

with fifteen other items aggregating $204.16, the sixteen items being mailed on Saturday, February 25, 1933, and received by the First National Bank of Chattanooga on Sunday, February 26, 1933 (R. 2).

3. The First National Bank had ceased active operation and its business had been taken over by the Chattanooga National Bank, consequently the draft was endorsed by the First National Bank, "Pay to the order of any bank or banker," and was delivered to the Chattanooga National Bank, which endorsed it in like language, and on Sunday, February 26, 1933, forwarded the draft by mail to the Central Trust Company of Cincinnati, Ohio, along with eighteen other items aggregating $570.00, making a total of $51,257.01 (R. 2-3).

4. On Monday, February 27th, the Chattanooga bank wrote petitioner as follows:

"Your Account Has Been Credited With Your Sendings as Follows:

Date	Description	Amount	Date	Description	Amount
25	RT	2.00			
25	RM	159.48			
25	RM	50,891.17			

This Bank accepts deposits and collections on the following conditions only:

(1) Items deposited on this bank which are not good at the close of the business day may be charged back to the depositor. (2) All items not drawn on this bank are taken at depositor's risk until actual final payment. (3) All items may be forwarded for collection or payment direct to the bank upon which they are drawn or where payable, or to or through collecting agents, which agents shall have the right to send same direct to the drawee bank or where payable. (4) This bank or collecting agents may receive either cash or drafts of the payee bank or other bank and will not be

liable for failure to collect drafts so received nor for losses thereon. And should either the item itself be lost or no returns be received within a reasonable time or the draft paying same be dishonored, the amount of said items may be charged back to the customer without liability upon the part of the bank—whether the item itself can be returned or not. (5) Each collecting agent is the agent of the depositor, and neither this bank nor any collecting agent shall be responsible for the defaults, neglects or omissions of any other bank or subagent, including the payee of such check or other items. (6) Delivery to the bank of items for collection or credit shall constitute acceptance of the above conditions by the depositor, in the absence of written notice to the contrary at the time'' (R. 3-4).

The above-quoted communication was received by the petitioner on February 28th. Said communication correctly stated the understanding; the petitioner understood that said draft was received by the Chattanooga bank only as the petitioner's agent for collection; that the title did not pass to the Chattanooga bank, and that the Chattanooga bank would not become liable for the item or proceeds thereof until actual final payment to the Chattanooga bank. A general custom existed by which checks and drafts transmitted to Chattanooga banks were received by such banks as agents for collection, without liability for funds collected until actual final payment to such banks; in fact, such was the rule of law which then and for many years had prevailed in the State of Tennessee (R. 4).

5. Before said draft was received by the Chattanooga bank the petitioner had on deposit in said bank about $8,000 and did not withdraw any funds thereafter. On March 2, 1933, the petitioner drew on the Chattanooga bank for $5,000, but the draft was returned unpaid without any explanation. On March 3, 1933, the petitioner wrote the bank requesting that it ship $5,000, and received

a reply that the Governor's proclamation required observance of a holiday, thereby preventing the transaction of business (R. 4-5).

6. The draft was received by the Central Trust Company of Cincinnati before 10 a. m. on Monday, February 27, and was presented before noon to the drawee, the treasurer of the Cincinnati, New Orleans & Texas Pacific Railway Company, and was paid before 2 p. m., on the same day (R. 5).

7. On the 27th the Central Trust Company of Cincinnati wrote the Chattanooga bank as follows:

"Feb. 27, 1933

The Central Trust Company
Cincinnati, Ohio

Chattnooga National Bank,
Chattanooga,
Tennessee

In receiving checks, drafts, notes and all other items for deposit or collection, this bank acts only as depositor's collecting agent and assumes no responsibility beyond the exercise of due care. All items are credited subject to final payment in cash or solvent credits. This bank will not be liable for the default, failure or negligence of any of its direct or indirect collecting agents or correspondents nor for losses in transit and each such collecting agent or correspondent shall not be liable except for its own negligence. Right is reserved and this bank or any of its correspondents may send items, directly or indirectly, at its discretion, to any bank, including the drawee or payor bank, and accept draft or credit of drawee or payor bank as conditional payment in lieu of cash; and this bank or any of its correspondents may charge back any item at any time before final payment, whether returned or not, also any item drawn on this bank not good at close of business on day deposited. City checks will be held at depositor's risk until next day's settlement between

banks. In making deposits, the depositor assents to the foregoing conditions.

We Credit Your Account

Description	Amount
25	340.07
	664.05
	1,020.51
	51,257.01"

This letter was received by the Chattanooga bank on February 28th. It had been the agreement of the Cincinnati bank and the Chattanooga bank for years that items transmitted as this draft had been transmitted were received by the Cincinnati bank solely as agent of the owner of the check or draft transmitted (R. 5-6).

8. No notice was ever sent by the Chattanooga bank to the petitioner with reference to the collection of said draft, nor was any notice transmitted by the Cincinnati bank to the Chattanooga bank informing the latter that said draft had been paid by the drawee (R. 6).

9. On Monday, February 27th, the Chattanooga bank, in anticipation of the payment of said draft, drew a check upon the Cincinnati bank in favor of the Federal Reserve Bank for $40,027.00 for the purpose of transferring that amount to its account with said Reserve Bank. This check was presented to the Cincinnati bank on Tuesday, February 28th, and its payment was refused, because the Cincinnati Clearing House had adopted an order restricting all withdrawals from its members to 5 per cent of balances. The Governor of Tennessee issued a proclamation proclaiming: "A holiday, commencing Wednesday, March 1, 1933, and extending through Monday, March 6, 1933, and effective to all banks in Tennessee." Subsequently, this holiday was extended; and during the following week a

holiday for the banks was called by the President. Plaintiff began to observe the moratorium called by the Governor on Wednesday, March 1, 1933, and thereafter it did no banking business until the termination of said moratorium (R. 7).

10. At the close of business on Saturday, February 25, 1933, the last day before transmission of the draft in question, the Chattanooga National Bank had a balance with the Central Trust Company of $12,423.32. At the close of business on February 28th the Chattanooga National Bank had a balance with the Central Trust Company of $71,552.83. The Chattanooga bank did not open on March 2, 1933, and after some adjustments had been made by the Conservator of the Bank and the Central Trust Company, the balance held by the Central Trust Company, collected on items forwarded to it by the Chattanooga National Bank, was about $68,000.00, which included the $50,687.01 received on the draft that belonged to plaintiff; and the entire amount of said fund was transferred to the Federal Reserve Bank at the instance of the Conservator of the Chattanooga National Bank and was placed to his credit, and thereafter, upon the appointment of defendant as receiver of said bank, all of said fund came into his hands as such receiver. No part of said fund of $50,687.01 received in payment of said draft was withdrawn from the Central Trust Company by the Chattanooga National Bank, but it remained in the custody of the Central Trust Company until the said transfer to the Federal Reserve Bank was made (R. 7-8).

11. The Chattanooga National Bank was never open for business after March 1, 1933. The petitioner was informed on March 14, 1933, that a Conservator had been appointed, and thereafter, without reopening, the respondent Paul J. Kent was appointed receiver (R. 8).

12. The Chattanooga National Bank acted solely as peti-

tioner's agent throughout the transactions described, and the respondent holds the proceeds of the said draft as Trustee for the petitioner (R. 8-9).

The complaint prayed a judgment for the principal amount of said draft, less dividends paid by the receiver, plus interest thereon, and for general relief (R. 9).

MOTION TO DISMISS.

A motion to dismiss was filed upon the grounds that the complaint fails to state a claim upon which relief can be granted; that the complaint shows on its face that the relationship of debtor and creditor existed between the Chattanooga National Bank and the petitioner by reason of the unrestricted endorsement and delivery of the draft; that upon the collection of the draft by the Central Trust Company of Cincinnati and the crediting of the proceeds thereof to the account of the Chattanooga National Bank, the relationship of debtor and creditor came into existence between the petitioner and that bank, and that the case of **Roscoe Byrd, Trustee, and Scott County v. Paul J. Kent, Receiver** (C. C. A. 6, 1938), 97 Fed. (2d) 971, constitutes the law of the case and establishes that upon the collection of the draft by the Central Trust Company of Cincinnati and the crediting of the proceeds to the account of the Chattanooga National Bank the relationship of debtor and creditor came into existence.

DECISIONS OF THE LOWER COURTS.

The District Judge sustained the motion to dismiss and dismissed the cause (R. 18) upon the ground that the petitioner was a mere creditor of the Chattanooga bank and not the owner of the proceeds of the draft (R. 16-17).

The cause was duly appealed to the Sixth Circuit Court of Appeals (R. 18-24). That Court affirmed the judgment

of the District Court (R. 25). The grounds for this decision, as shown by the opinion (R. 26-34), were that the petitioner was a mere creditor of the Chattanooga bank from the time of delivery of the draft to the latter bank, and certainly became such creditor from the time the Cincinnati bank collected the proceeds and credited them to the account of the Chattanooga bank.

The petitioner filed a petition for rehearing. This petition shows that the decision of the Court of Appeals in both of its aspects is contrary to the Tennessee law and to the agreement between the petitioner and the Chattanooga bank, as evidenced by the latter's letter of acknowledgment of receipt of the draft, the letter accompanying the draft, and the custom prevailing (R. 37-45). The Court of Appeals denied the petition for rehearing (R. 69).

ASSIGNMENT OF ERRORS.

1. The Circuit Court of Appeals erred in holding that the Chattanooga National Bank became the owner of the draft upon receiving it, and did not hold the same as agent for petitioner. This was error because, first, the parties expressly agreed that the Chattanooga bank receive the draft only as agent for collection; second, the rule of law in Tennessee was and is that the Chattanooga bank received the draft only as agent.

2. The Circuit Court of Appeals erred in holding that the Chattanooga National Bank became owner of the proceeds of the draft upon collection thereof by the Cincinnati bank and crediting of the same to the account of the Chattanooga National Bank, instead of holding that the proceeds became the property of petitioner upon such collection and crediting. Such action was error because the Chattanooga bank, under the Tennessee law and the agreement of the parties, continued to be a mere agent for the petitioner.

3. The Circuit Court of Appeals erred in affirming the judgment of the lower Court. Such was error because, under the law of Tennessee and the agreement of the parties, the petitioner was the owner of the proceeds of the said draft when they were paid to the respondent receiver and is entitled to full payment thereof from him.

4. The Circuit Court of Appeals erred in not reversing the judgment of the lower Court, overruling the motion to dismiss, and directing that the trial proceed on the merits, and that petitioner be awarded interest upon such recovery as may be obtained. Such was error because under the law of Tennessee and the agreement of the parties the proceeds of the said draft were held by the Chattanooga bank and the respondent as agent for the petitioner, who was and is the owner thereof.

JURISDICTION OF THIS COURT.

The United States District Court had jurisdiction of this case because it is a case for winding up the affairs of a national bank. 36 Stat. 1092, R. S., Sec. 563, par. 15, Sec. 629, pars. 10, 11; 28 U. S. C. A., Sec. 41 (16). The Supreme Court of the United States has jurisdiction under the provisions for review of cases falling within the jurisdiction of lower Courts of the United States contained in Art. III, Sec. 2, paragraphs 1 and 2, of the Constitution of the United States. The Supreme Court of the United States has uniformly accepted jurisdiction in like cases. **Dakin v. Bayly**, 290 U. S. 147; **Ticonic National Bank v. Sprague**, 303 U. S. 406.

A full copy of the opinion of the Circuit Court of Appeals in this case is contained in the record (R. 26-34), and for that reason is not set out here. It is also reported: **First Trust & Savings Bank of Oneida, Tennessee, v. Kent** (C. C. A. 6, 1941), 119 Fed. (2d) 151.

THE QUESTIONS PRESENTED.

The questions presented are as follows:

1. Whether or not, under the Tennessee law, a negotiable draft endorsed and delivered to a bank for collection and credit, no part of the credit being withdrawn, continues to be owned by the depositor so that the relation of principal and agent between the depositor and the bank of deposit is created.

2. Whether or not, under the Tennessee law, the collection of the item by a third bank and the crediting of the proceeds to the account of the bank of deposit (the forwarding bank) terminates the said principal-agent relation and creates a relationship of creditor and debtor between the depositor and the bank of deposit.

3. Whether or not, under the agreement evidenced by the communications between the petitioner and the Chattanooga National Bank, and under the averred custom that banks accepted such items as agents for collection, the petitioner continued to be the owner of the item and also the owner of the proceeds of the item after collection by the Cincinnati bank.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The writ of certiorari should be granted because:

(1) The Circuit Court of Appeals for the Sixth Circuit has rendered a decision in conflict with the decision of the Circuit Court of Appeals of the Fifth Circuit in the case of **Washington Loan & Banking Company v. Fourth National Bank of Macon** (C. C. A. 5, 1930), 38 Fed. (2d) 772, and in conflict with the decision of the Circuit Court of Appeals for the Fourth Circuit in **Beane v. First National Bank &**

Trust Company of Asheville, N. C. (C. C. A. 4, 1937), 92 Fed. (2d) 382.

(2) The Circuit Court of Appeals for the Sixth Circuit has decided this case in a way in conflict with the applicable local decisions.

Bank of Louisville v. Bank of Knoxville (1874), 67 Tenn. 101;
Bank v. Cummings (1890), 89 Tenn. 609;
Givan v. Bank (Tenn. Chy. App. 1898), 52 S. W. 923, 47 L. R. A. 270;
Winchester Milling Company v. Bank of Winchester (1907), 120 Tenn. 225;
Bank & Trust Company v. Bonner (1911), 1 Higg. (Tenn. Court of Civil Appeals) 443;
Implement Company v. Mercantile Bank (1913), 128 Tenn. 320;
L. & N. R. R. Co. v. Federal Reserve Bank of Atlanta (1928), 157 Tenn. 497;
Dean Tobacco Warehouse Company v. American National Bank (1938), 173 Tenn. 365, 117 S. W. (2d) 747.

(3) The Circuit Court of Appeals for the Sixth Circuit has rendered a decision in direct conflict with applicable decisions of this Court.

Commercial Bank v. Armstrong, 148 U. S. 50;
Dakin v. Bayly, 290 U. S. 143;
Federal Reserve Bank v. Malloy, 264 U. S. 160.

Wherefore, your petitioner prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the United States Circuit Court of Appeals, Sixth Circuit, commanding the said Circuit Court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in said case therein entitled, "First Trust & Savings Bank

of Oneida, Tennessee, v. Paul J. Kent, Receiver of Chattanooga National Bank, No. 8492," to the end that said case may be reversed and determined by this Court, as provided by statute, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with law, and that the said judgment of the said Circuit Court of Appeals may be reversed. Since the mandate of the said Court of Appeals has been issued, it is prayed that that Court be directed to recall its mandate. And your petitioner will ever pray.

FIRST TRUST & SAVINGS BANK OF ONEIDA, TENNESSEE,

By J. A. FOWLER,

Counsel.

S. F. FOWLER,

Of Counsel.